United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7170

United States Court of Appeals

For the Second Circuit

B P/S

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff-Appellee,

—against—

AMERICAN STEVEDORES, INC.,

Third Party Defendant-Appellant,

—and—

A.M. KRISTOPHER CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE

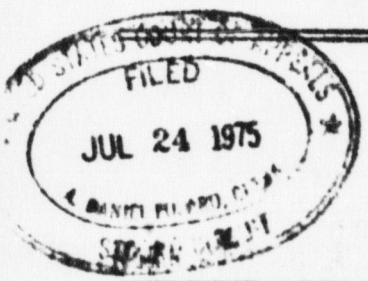

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TABLE OF CONTENTS

CASES CITED

PAGE

STATUTES CITED

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Statement

By memorandum opinion dated December 27, 1974, the Honorable Edward R. Neaher granted the motion of appellee, defendant and third party plaintiff in the court below, for summary judgment against third party defend-

ant, American Stevedores, Inc., *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 387 F. Supp. 754 (EDNY, 1974). American appeals from the judgment entered thereon on February 4, 1975.

Joseph Rodriguez brought this action in the United States District Court for the Eastern District of New York to recover damages for injuries which he sustained on July 3, 1967, while working as a longshoreman in the employ of American Stevedores, Inc. aboard the m/s Sunny Prince, a cargo vessel owned by Olaf Pedersen's Rederi A/S. The vessel owner, in turn, impleaded plaintiff's employer and another independent contractor, A.M. Kristopher Co., Inc., as third party defendants alleging breach of warranty of workmanlike performance. The claim against A.M. Kristopher was eventually discontinued.

The case came on for trial before the Honorable George Rosling on February 16, 1971, at the conclusion of which he submitted written interrogatories to the jury. In response, the jury found the shipowner negligent and its vessel unseaworthy. The jury further found that Rodriguez had been contributorily negligent and, accordingly, reduced his award from $80,000 to $35,000. Upon these findings, the shipowner moved for a directed verdict on its indemnity claim against plaintiff's employer, American Stevedores, Inc., relying on the decisions of this Court in *Hartnett* v. *Reiss Steamship Company*, 421 F. 2d 1011 (2 Cir., 1970), cert. den. 400 U.S. 852; *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F. 2d 1334 (2 Cir., 1969), cert. den. 395 U.S. 946 and *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 (2 Cir., 1965).

Despite the fact that the three cited decisions approve a directed verdict in identical situations, Judge Rosling submitted the indemnity claim to the jury which found in favor of the stevedore. In response to the shipowner's post-

trial motions, Judge Rosling set aside the jury verdict on the indemnity claim against American and ordered a new trial of the issue (A. 682-686a).* Plaintiff's judgment, unchallenged, has been satisfied by the shipowner.

When Judge Rosling died prior to retrial, the case was assigned to Judge Neaher in April, 1973. After several conferences before Judge Neaher it became apparent that there was no prospect of either shipowner or stevedore introducing additional evidence of a truly probative nature on a new trial. There existed, therefore, two alternatives (1) read to a new jury the record at the first trial and such findings thereat as would be binding on the parties or (2) move for summary judgment before Judge Neaher on the existing record. The shipowner chose the latter course and Judge Neaher's opinion, 387 F. Supp. 754, granting indemnity, gave rise to the instant appeal.

The Facts

On July 3, 1967, the longshore gang in which Rodriguez was a holdman was assigned by appellant to discharge boxes of frozen shrimp from reefer compartments located in the after end of the No. 2 upper 'tween deck of the m/s Sunny Prince (A. 18a-21a). This work was concluded at approximately 11:00 a.m. and the gang was directed to leave the hatch (A. 31a-32a). According to Rodriguez, he assumed that the direction to leave the hatch was because it was time for lunch; that the gang would thereafter return and, accordingly, he left his gloves and longshoreman's hook in that compartment. As he was about to disembark, Rodriguez was allegedly told that the gang was being shifted to hatch No. 4. There, they spent the remainder of the morning opening the hatch (A. 239a-245a).

Following lunch, Rodriguez ascertained that the cargo to be discharged from No. 4 was hides which required the

* All "A" references are to the Joint Appendix.

use of his hook and gloves and, accordingly, he asked his immediate superior if he could return to hatch No. 2 to retrieve his gear and was told he could do so (A. 245a-246a). At the time of their conversation, both men were in the upper 'tween deck of hatch No. 4, the same deck level as the compartment in which the gang had worked at No. 2 (A. 246a-247a). No further supervision of the route to be taken by Rodriguez in returning to No. 2 was offered by his employer.

Instead of going back up to the weather deck and walking forward to No. 2, plaintiff observed a door at the forward end of No. 4 upper 'tween deck, slightly ajar. Assuming that he could eventually work his way forward on the same deck level to the No. 2 upper 'tween deck, Rodriguez pushed the door open, stepped into a "passageway" and began walking forward (A. 247a-248a). As the area immediately beyond the doorway was very dark, Rodriguez removed a small "penlight" from his keychain and shined it in front of him (A. 360a-364a). With the penlight providing the only source of illumination, Rodriguez proceeded forward until he eventually came to the No. 2 upper 'tween deck. The vessel's plan, plaintiff's Exhibit 3 in evidence, shows the total distance from the forward end of No. 4 to the afterend of No. 2 to be approximately 94′ (A. 497a-499a).

On entering No. 2 at the 'tween deck level and still in darkness, Rodriguez, nonetheless, proceeded. For reasons set forth in the opinion of Judge Neaher, Rodriguez tripped and fell through the partially opened 'tween deck hatch square into the lower hold.

When Rodriguez was found, a single carton of frozen shrimp was also observed in the 'tween deck. There was no sign of the gloves and hook which allegedly prompted Rodriguez to return alone to hatch No. 2 via the undetectable route described above (A. 581a-585a, 591a).

There is not the slightest suggestion in the record that the ship's personnel knew or should have known that Rodriguez was about the enterprise alleged. The only one who knew was his immediate superior who took no steps to supervise the venture, 387 F. Supp. at 760.

Under the circumstances and for the purpose of the motion below, appellee stipulated:

> ". . . that it negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident in that: the vessel's chief officer directed the foreman of ship cleaners employed by third party defendant, A.M. Kristopher Co., to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed during the course of cleaning operations; that such action left the No. 2 in total darkness and that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar and there were no signs warning persons, such as plaintiff, that the conditions described above, existed."*

POINT I

Plaintiff's contributory negligence constituted a breach of his employer's warranty of workmanlike service.

As noted above, the trial jury, in response to written questions submitted by Judge Rosling, found that Rodriguez

* This stipulation was, perforce, more favorable to the appellant than fair inferences from the testimony might have dictated. For example, the testimony of the vessel's Chief Officer clearly shows that, while there was no further stevedoring work to be done in No. 2 on the day of the accident, such operations were resumed two days later and that, therefore, the covering of the 'tween deck hatch square by the ship cleaners would have been pointless.

had been contributorily negligent to a substantial degree and reduced his award accordingly from $80,000 to $35,000. Appellant has never questioned this finding.

The contributory negligence of a plaintiff-employee has long been imputed to his third party defendant-employer in determining whether the latter has breached its implied warranty of workmanlike performance owing to a vessel owner, *Damanti* v. *A/S Inger*, 314 F. 2d 395 (2 Cir., 1963); *Shenker* v. *United States*, 322 F. 2d 622 (2 Cir., 1963); *Nicroli* v. *Den Norse Afrika et al.*, 332 F. 2d 651 (2 Cir., 1964). As the court stated in *Nicroli*, 332 F. 2d at 656:

> "Moreover, the plaintiff's own negligence in failing to watch where he was going and in taking an unsafe route when he knew that a safe route was available would be sufficient to charge the stevedore with breach of its warranty of workmanlike service. Damanti v. A/S Inger, 314 F. 2d 395, 399 (2 Cir., 1963)."

By way of further application of the principle, this Court has consistently approved the direction of a verdict in favor of a vessel owner on its claim for indemnity for breach of a contractor's warranty where the contractor's employee (plaintiff) has first been found guilty of contributory negligence, *Mortensen* v. *A/S Glittre; McLaughlin* v. *Trelleborgs Angfartygs A/B; Hartnett* v. *Reiss Steamship Company, supra.* The rationale of this application of the rule was announced in *Mortensen*, 348 F. 2d 383 at 385:

> "Mortensen's negligent conduct, which is imputed to his employer, was manifestly a breach of Federal's warranty of a workmanlike performance of the obligations of the contract."

Following *Mortensen*, the issue was next before the Court in *McLaughlin*. There, the trial jury brought in a

special verdict that the vessel was unseaworthy, the shipowner negligent and plaintiff, himself, contributorily negligent. Based upon the last mentioned finding, the trial court directed a verdict in favor of the vessel owner on its claim for indemnity against plaintiff's employer, the third party defendant. In affirming, this court stated, 408 F. 2d at 1336:

> "The rationale of *Mortensen* was rather that the jury's finding of contributory negligence by the third party defendant's employee was conclusive of breach of the defendant's W.W.P. [warranty of workmanlike performance]. This following logically from an earlier holding of ours that a finding that an injured longshoreman had negligently exposed himself to danger required entry of judgment for indemnity, even though the employer had no real opportunity for control. Damanti v. A/S Inger, 314 F. 2d 395 (2 Cir., 1963). See also, Shenker v. United States, 322 F. 2d 622, 628-629 (2 Cir., 1963) [express warranty]; Nicroli v. Den Norske Afrika—OG Australielinie, supra, 332 F. 2d at 656."

The Court in *McLaughlin* then discussed the holding of the Supreme Court in *Italia Societa per Azioni* v. *Oregon Stevedoring Co.*, 376 U.S. 315, in human terms and stated, 408 F. 2d at 1337:

> "We see no reason to suppose that the *Italia* doctrine applies only to material and not to human resources; indeed the Court's footnote reference to *Calderola* and *Orlando*, 376 U.S. at 321 n. 8, 84 S. Ct. 748, in support of a statement concerning equipment would not have been pertinent unless the Court considered that personnel should be treated on the same basis as rope. Putting the *Italia* criteria

> in human terms, while Golten did not warrant a perfect rigger, it did warrant one who would not in fact be negligent."

The most recent decision in the triology dealing with the precise issue was *Hartnett* v. *Reiss Steamship Company*, 421 F. 2d 1011 (2 Cir., 1970), cert. denied 400 U.S. 852, where the Court explained its holding in *McLaughlin* as follows, 421 F. 2d at 1018:

> "We there held that a stevedore warranted employees who would in fact not be negligent, and that a jury finding that a stevedore's employee (the plaintiff) was contributorily negligent conclusively determined the stevedore's breach of warranty."

In accord are the unequivocal holdings of the Fourth and Ninth Circuits, *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F. 2d 26 (4 Cir., 1971); *Chinese Maritime Trust, Ltd.* v. *Carolina Shipping Co.*, 456 F. 2d 192 (4 Cir., 1972); *Arista Cia. DaVapores S.A.* v. *Howard Terminal*, 372 F. 2d 152 (9 Cir., 1967).

Not surprisingly, Point IA of appellant's brief, discussing the effect of its employee's contributory negligence on the indemnity issue, ignores all of the above-cited authorities and stresses, solely, *Nye* v. *A/S D/S Svendborg*, 501 F. 2d 376 (2 Cir., 1974) cert. den. — U.S. —. Appellee contends that the *Nye* case is expressly inapposite. While plaintiff-employee was there permitted to recover against a shipowner and the latter, despite plaintiff's contributory negligence, was denied indemnity against his employer, this Court felt no compulsion to discuss the *Mortensen, McLaughlin* and *Hartnett* line of cases, saying, 501 F. 2d at 380:

> "The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case."

At no point does appellant even suggests that it owed no such warranty to the owner of the Sunny Prince.

Appellant also cites *Anzalone* v. *Moore-McCormack Lines, Inc.*, 43 A.D. 2d 818, 351 N.Y.S. 2nd 6 (1st Dep't., 1974) and *Julian* v. *Mitsui O.S.K. Lines Ltd.*, 479 F. 2d 432 (5 Cir., 1973) cert. den. 414 U.S. 1093, as adopting a rule that the employee's contributory negligence is but a factor to be considered in assessing the employer's liability in indemnity. Suffice it to say that the majority and dissenting opinions in both cases acknowledged a contrary rule in the Second Circuit.

A re-reading of *McLaughlin, supra*, reveals that the choice was carefully considered by this Court when it stated, 408 F. 2d at 1336:

> "The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a disability preventing a plaintiff from recovering. See Restatement of Torts 2d § 463 (1965); 2 Harper & James, Torts § 22.10 (1956); Prosser, Torts § 64 (2d ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the employer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not

alone support a verdict in favor of the indemnitee, let alone the direction of one.

> "We think, however, that under Italia Societa per Azioni v. Oregon Stevedoring Co., 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964), the W W P is not so limited."

Appellant's reference to *Lanzetti* v. *Grace Line, Inc.*, 478 F. 2d 1398 is hardly persuasive since it is, admittedly, an affirmance in another circuit, without opinion, of an unpublished district court decision. Under these circumstances, it should not be considered as authority for the proposition advanced.

POINT II

There was insufficient evidence of conduct sufficient to preclude indemnity to warrant submission of the issue to the jury.

Appellee does not quarrel with the principle announced in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958) to the effect that, in a given case, a shipowner's conduct may be sufficient to preclude indemnity. Rather, appellee's position was concisely stated by Judge Neaher, 387 F. Supp. at 758:

> "While it is true that 'the issue of whether the shipowner has precluded itself is an issue of fact,' Hurdich v. Eastmount Shipping Corp., 503 F. 2d 397, at 401, n. 3 (2 Cir., 1974) this is not to be taken as barring judicial evaluation of the sufficiency of the evidence relied on to support a finding that the shipowner should be denied indemnity. Indeed, it seems manifest that Judge Rosling set the jury's verdict aside and ordered a new trial because he

> viewed the existing evidence as insufficient to warrant such a denial."

Following pronouncement of the abstract principle in *Weyerhaeuser, supra*, this Court first applied it to a concrete fact situation in *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats*, 346 F. 2d 481 (2 Cir., 19), reversed on other grounds 382 U.S. 283 (1965), and held, 346 F. 2d at 484:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough...."

This statement was most recently reaffirmed in *Fairmont Shipping Corp.* v. *Chevron International Oil Company*, 511 F. 2d 1252 (2 Cir., 1975) at p. 1260.

Thus, both the Supreme Court's initial ruling and its application in *Albanese* were before this Court and were duly considered in the evolution of the *Mortensen, McLaughlin, Hartnett* line of cases which followed. In the latest of the three, *Hartnett*, plaintiff had been found contributorily negligent and the trial judge directed a verdict against his employer on the shipowner's indemnity claim. In affirming, this Court made the following pertinent observations, 421 F. 2d at 1017:

> "Grain Handling next argues that it should have been allowed to submit to the jury its claim that it did not breach its warranty to the vessel. Grain Handling relies on International Terminal Operating Co. v. N.V. Neder, Amerk. Stoomv. Maats., 393 U.S. 74, 89 S. Ct. 53, 21 L. Ed. 2nd 58 (1968) [*Albanese* case in the Supreme Court]....

> "We believe that disposition of this point is controlled by our recent decision in McLaughlin v. Trelleborgs Angfartygs A/B, 408 F. 2d 1334 (2 Cir., 1969) cert. den. Golten Marine Co. v. Trelleborgs Angfartygs, 395 U.S. 946, 89 S. Ct. 2020, 23 L. Ed. 2nd 464 (1969). We there held that a stevedore warranted employees who would in fact not be negligent, and thus that a jury finding that a stevedore's employee (the plaintiff) was contributorily negligent conclusively determined the stevedore's breach of warranty." [Bracketed material added]

The holdings of this Court on the very issue here presented have been consistent since *DeGioia* v. *U.S. Lines*, 304 F. 2d 421 (2 Cir., 1962) where, in commenting on the scope of a stevedore's warranty, it was said, 304 F. 2d at 424:

> "Whether a hazard is created by the negligence of the shipowner or otherwise, the stevedoring firm is liable for indemnity if a workmanlike performance would have eliminated the risk of injury."

It is indeed startling to read the contention at p. 18 of appellant's brief that neither *Mortensen* nor its progeny *McLaughlin* and *Hartnett* have any application to a situation involving shipowner negligence. A mere reading of *McLaughlin* (where the indemnitor was represented by the same counsel as here) shows beyond doubt that not only was the vessel involved found unseaworthy but its owner negligent as well. Neither finding withstood the shipowner's motion for a directed verdict! An identical finding of shipowner negligence proved no obstacle to the Court of Appeals for the Fourth Circuit in *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F. 2d 26 (4 Cir., 1971) where the District Court's denial of indemnity was reversed

as a matter of law and judgment entered in favor of the shipowner on the strength of *McLaughlin*.

Appellant's stress of the exclusive control of the shipowner over conditions in hatch No. 2 following the stevedore's departure is a classic case of misplaced emphasis. Ignored, again, is the admonition of *McLaughlin* that the warrantor of services will be responsible for the contributory negligence of its employee ". . . even though the employer had no real opportunity for control.", 408 F. 2d at 1336. Would appellant argue, consistently, that the shipowner in some way also controlled the activities of Rodriguez and his immediate superior who failed to exercise even minimal supervision of his subordinate's activities?

It is submitted that, even standing alone, Rodriguez' conduct constituted a breach of his employer's warranty. Whatever the shipowner should or should not have done, a workmanlike performance on Rodriguez' part would have eliminated the risk of injury, *DeGioia* v. *U. S. Lines*, *supra*. It was his negligence at the very least which brought into play the unseaworthiness of the vessel within the meaning of *Crumady* v. *Joachim Hendrick Fisser*, 358 U.S. 423.

As noted by Judge Neaher, 387 F. Supp. at 760:

> "Rodriguez did not enter hatch #2 in order to perform any assigned task. Pedersen had no reason to expect longshoremen to be in that hold, since the stevedore's work there had been completed. And if the *Italia* test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light."

The extended reference to *Badalamenti* v. *United States*, 160 F. 2d 422 (2 Cir., 1947) at pp. 14-16 of appellant's

brief shows little more than a superficial resemblance to the facts of this case. Upon analysis it becomes apparent that there are basic factual distinctions; the cited case was deal with a finding of contributory negligence and was decided before the Supreme Court imposed upon a stevedore the warranty of workmanlike performance in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

Hurdich v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (2 Cir., 1974), also relied upon by appellant, does not support its position. That case involved neither (1) a finding of contributory negligence nor (2) an indemnity claim against the employer of a contributorily negligent employee. However, because it is a recent discussion by this Court of the question of "conduct sufficient to preclude", appellee would point to the following significant passage from the Court's opinion, 503 F. 2d at 402:

> "Indeed, regardless of the legal theory applied in the cases, the issue of whether the shipowner is precluded from indemnity might conceivably have been decided in many of them, as a practical matter, on a determination of whose fault is latest in time, the shipowner's or the workman company's. (citations omitted) Of course, in most instances, this is merely a recognition that the party whose fault is immediately antecedent to the injury is the party who was in the optimal position to prevent the injury."

Can it be seriously contended that Rodriguez' contributory negligtnce was not, in fact, "immediately antecedent to the injury"?

The same, basic distinction—absence of a finding of contributory negligence—exists in *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F. 2d 437 (2 Cir., 1974) cited by appellant. There, the trial judge submitted written interrogatories to the jury which specifically exonerated plaintiff of any contributory negligence. Again in clear distinction to the circumstances of the present case, the shipowner's representative in *Conceicao* failed to supply the contractor with essential information concerning the very area in which the contractor was then working and compounded this omission by failing to do something by way of supervision of the operation. The total effect of these combined failures was held sufficient to justify a jury finding that the vessel owner had been guilty of conduct sufficient to preclude recovery in indemnity. In affirming, however, this court was careful to re-assert that ". . . the right to indemnity has been extended to a case where there was a finding of negligence on the part of the shipowner." 508 F. 2d at 443.

The final argument of appellant, that it was denied a constitutional right to trial by jury, should be accorded no more weight here than it was when the same counsel advanced it in *McLaughlin, supra.* In there disposing of the contention, the Court stated, quite succinctly, 408 F. 2d at 1338:

> "We are reversing no jury determination here; the jury has found that McLaughlin acted unreasonably."

For other cases holding a shipowner's conduct insufficient, *as a matter of law*, to preclude recovery, see:

(1) *Misurella* v. *Isthmian Lines, Inc.*, 328 F. 2d 40 (2 Cir., 1964)

(2) *Drago* v. *A/S Inger*, 305 F. 2d 139 (2 Cir., 1962)

(3) *Calmar Steamship Corporation* v. *Nacirema Operating Company*, 266 F. 2d 79 (4 Cir., 1957)

(4) *Americacn Export Lines* v. *Revel*, 266 F. 2d 82 (4 Cir., 1959)

(5) *H. & H. Ship Service Co.* v. *Weyerhaueser Line*, 382 F. 2d 711 (9 Cir., 1967).

POINT III

The stevedore is not entitled to judgment in its favor on the indemnity issue.

In response to appellee's post-trial motions, Judge Rosling set aside the jury verdict denying indemnity and directed a new trial of the issue. The order granting a new trial stood unchallenged for two years when, roused by the motion for summary judgment before Judge Neaher, appellee crossed-moved under Rule 60(b) of the Federal Rules of Civil Procedure to recall that portion of Judge Rosling's order as granted a new trial of the indemnity issue.

Rule 60(b) contains six subdivisions and, significantly, appellee did not specify under which subdivision its motion was brought. However, a fair reading of the papers submitted in support of that motion indicated that it probably belonged under Subsection (2) of Rule 60(b) dealing with newly discovered evidence. Since that subsection carries with it a one year time limitation, appellee's motion was, on its face, untimely. See *Klapprott* v. *United States*, 335 U.S. 601, 613.

Appellee further opposed any suggestion that the motion should be considered as brought under Subdivision (6) of Rule 60(b), the catch-all clause to which a "reasonable time" limitation pertains. It was pointed out to Judge

Neaher that Subdivision (6) deals only with judgments and that appellee's motion was not addressed to a "judgment". Appellee also call the District Court's attention to the decision in *Davis* v. *Wadsworth Construction Company*, 27 F.R.D. 1 (1961), dealing with a motion under Rule 60 (b) where is was said at p. 2:

> "Clause 6 cannot be invoked where the reasons for the motion are covered in Clauses (1), (2) and (3)."

Professor Moore, commenting on the very question under consideration, 7 Moore's Federal Practice (2d Ed.) p. 295, states as follows:

> "It is important to note, however, that Clause (6) contains two very important internal qualifications to its application: First, the motion must be based upon some reason other than those stated in Clauses (1)-(5); and second, the other reason urged for relief must be such as to justify relief.
>
> ". . . The maximum time limitation of one year applied to Clauses (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under Clause (6) for reasons covered by Clauses (1), (2) and (3)."

In Point I of its brief, seeking judgment in its favor, appellant makes no reference to its motion in the District Court or the procedural vehicle employed. In fact, appellant cites not a single authority in support of its contention that it is entitled to judgment in its favor at this time. Appellant decries what it calls "an anomalous result" but fails to point to any way in which the case is distinguishable in principle from *McLaughlin, supra.*

Appellee respectfully submits that Judge Neaher's opinion in the District Court is a precise, well reasoned application of precedent to the facts established at the original trial and that the judgment entered thereon should be affirmed.

CONCLUSION

The judgment of the District Court should be, in all respects, affirmed.

Respectfully submitted,

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3 Copies Rec'd 7-24-75
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